

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Committee Code Not Found

BILL: SPB 7066

INTRODUCER: For consideration by the Committee on Regulated Industries

SUBJECT: Public Records and Public Meetings/Public Service Commission

DATE: March 22, 2021

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Sharon	Imhof		Pre-meeting

I. Summary:

SPB 7066 creates a public meetings and public records exemption for certain confidential information discussed at a Public Service Commission (PSC) hearing, where it is found that the hearing cannot otherwise be fully and fairly conducted.

The bill expressly exempts any hearing or portion of a hearing before the PSC, which it finds cannot be fully and fairly conducted without revealing information that has been made confidential by order, in response to a claim of proprietary confidential business information, or a request for confidentiality.

The bill requires the PSC to make a finding of confidentiality no later than 20 days before the scheduled hearing. Additionally, the entire hearing, including confidential portions, must be recorded by a certified court reporter.

The bill provides a 21-day time frame, after the transcript is filed with the clerk, during which parties may make a claim that certain portions of the transcript should remain exempt from public disclosure, otherwise the claim is waived. The bill requires the PSC clerk to prepare a transcript redacting information approved by the PSC for confidential treatment. The redacted transcript is subject to public records laws at the conclusion of the underlying proceeding.

The bill provides a mechanism for a court to review the transcript to determine if the redactions do not comply with applicable confidentiality orders. If a judicial determination is made, only the portion of the recording or transcript found to be non-exempt may be disclosed to the public.

Under the bill, the PSC is not required to live-stream or make a recording available on its website for any portion of a hearing made exempt under its provisions.

The bill provides a statement of public necessity.

In accordance with s. 119.15, F.S., the bill provides that these exemptions are subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill is effective upon becoming law.

II. Present Situation:

Public Records

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ The right to inspect or copy applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.² However, the Legislature may provide a public records exemption from the requirements of Article I, section 24(a) through general law.³ The law must state with specificity the public necessity justifying the exemption and must be no more broad than necessary to accomplish its purpose.⁴

Public Meetings

The Florida Constitution sets forth the state's public policy regarding access to government meetings.⁵ All meetings of any collegial public body of the executive branch of state government or of a county, municipality, school district, or special district where public business will be transacted or discussed must be open to the public and noticed.

Florida Statute addresses public meetings in more detail within the "Government in the Sunshine Law" or "Sunshine Law."⁶ This act requires meetings of any board or commission of any state agency, in which official acts are to be taken, to be open to the public at all times.⁷ The board or commission is required to provide reasonable notice of all such meetings.⁸ Entities subject to the Sunshine Law are "prohibited from holding meetings at any facility or location which discriminates on the basis of sex, age, race, creed, color, origin, or economic status or which operates in such a manner as to unreasonably restrict public access to such a facility."⁹ Minutes must be kept for all public meetings and promptly recorded.¹⁰ These records are open to public inspection and this right is enforceable in state circuit court, authorized to issue injunctive relief.¹¹

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

³ FLA. CONST. art. I, s. 24(c).

⁴ *Id.*

⁵ FLA. CONST. art. I, s. 24(b).

⁶ Section 286.011, F.S.

⁷ *Id.*

⁸ Section 286.011(1), F.S.

⁹ Section 286.011(6), F.S.

¹⁰ Section 286.011(2), F.S.

¹¹ *Id.*

Open Government Sunset Review Act

The Open Government Sunset Review Act¹² (act) prescribes a legislative review process for newly created or substantially amended¹³ public records or open meetings exemptions, with specified exceptions.¹⁴ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁵

This act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.¹⁶ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;¹⁷
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁸ or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.¹⁹

The Public Service Commission

The Florida Public Service Commission (PSC) is an arm of the legislative branch of government.²⁰ The role of the PSC is to ensure that Florida's consumers receive utility services, including electric, natural gas, telephone, water, and wastewater, in a safe, affordable, and reliable manner.²¹ In order to do so, the PSC exercises authority over public utilities in one or more of the following areas: (1) Rate or economic regulation; (2) Market competition oversight; and/or (3) Monitoring of safety, reliability, and service issues.²²

¹² Section 119.15, F.S.

¹³ An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

¹⁴ Sections 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

²⁰ Section 350.001 F.S.

²¹ See Florida Public Service Commission, *The PSC's Role*, <http://www.psc.state.fl.us> (last visited Mar. 22, 2021).

²² *Id.*

The PSC is comprised of five commissioners.²³ They are appointed by the Governor and confirmed by the Florida Senate.²⁴ Commissioners are appointed to four-year terms, not to exceed three terms.²⁵ In administering their duties, commissioners serve in both a quasi-legislative and quasi-judicial capacity, as they adopt rules and render decisions in complex matters that are infused with legislative policy considerations.²⁶ They are regarded as subject matter experts as it relates to utility operations.²⁷

Proceedings before the PSC

Any meeting or proceeding with two or more PSC commissioners in attendance and any proceeding where a decision concerning the rights or obligations of any person is made, must be streamed live on the internet and a copy of the meeting or proceeding must be made available on the PSC's website.²⁸

During the PSC's hearings, commissioners rule on procedural matters, establish evidence of record, weigh record evidence, and apply the law to the facts of the case.²⁹ Many hearings involve proprietary confidential business information, which is exempt from public disclosure by statute.³⁰ The PSC has established practices and procedures which allow their hearings to be conducted in compliance with the Sunshine Law while still protecting proprietary confidential business information from disclosure.³¹ In these hearings, confidential material typically plays a minor role in the resolution of any particular issue, and the parties avoid public disclosure of this material by stipulating to certain facts and keeping discussions of confidential matters minimal.³²

The PSC is authorized to refer matters to the Division of Administrative Hearings (DOAH) for formal evidentiary hearings and fact finding.³³ However, the PSC conducts nearly all of its own hearings.³⁴ Historically, the PSC has only referred cases to the DOAH in rare instances, where the PSC has found that one or more issues in the docket are so inextricably intertwined with confidential information, and the volume of that information is so substantial, that it cannot afford the parties a full and fair hearing in the public while also protecting sensitive confidential information.³⁵

²³ Section 350.01, F.S.

²⁴ Section 350.031, F.S.

²⁵ Section 350.01, F.S.

²⁶ See PSC, *HB 1311 House Companion Agency Analysis* (Mar. 4, 2021) (on file with the Senate Committee on Regulated Industries).

²⁷ See s. 350.042(3)(a), F.S. providing legislative findings that commissioners should be “educated and informed on regulatory policies and developments in science, technology, business management, finance, law, and public policy which are associated with the industries that the commissioners regulate.”

²⁸ Section 350.01(8), F.S.

²⁹ PSC, *HB 1311 Analysis*, *supra* at n. 23.

³⁰ See s. 350.121, F.S.

³¹ PSC, *HB 1311 Analysis*, *supra* at n. 23.

³² *Id.*

³³ Sections 350.125 and 120.569(2), F.S.

³⁴ PSC, *HB 1311 Analysis*, *supra* at n. 23.

³⁵ *Id.*

Treatment of Proprietary Confidential Business Information before the PSC

The following provisions require records received by the PSC, which are claimed or found to be proprietary confidential business information by the PSC, to be kept confidential and exempt from public disclosure:

- Section, 364.183, F.S., relating to Telecommunications Companies;
- Section, 366.093, F.S., relating to Public Utilities;
- Section 367.156, F.S., relating to Water and Wastewater Systems; and
- Section 368.108, F.S., relating to Gas Transmission and Distribution.

“Proprietary confidential business information,” means:

information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person’s or company’s business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public.³⁶

It includes, but is not limited to the following:

- Trade secrets;
- Internal auditing controls and reports of internal auditors;
- Security measures, systems, or procedures;
- Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms;
- Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information; and
- Employee personnel information unrelated to compensation, duties, qualifications, or responsibilities.³⁷

A PSC finding on proprietary confidential business information is effective for a period set by the PSC, but may not exceed 18 months, unless the PSC also finds good cause that the information warrants protection from disclosure for a longer period of time.³⁸

III. Effect of Proposed Changes:

Section 1 amends s. 286.0113, F.S., relating to general exemptions from public meetings to provide a public meetings exemption for a hearing, or portions of a hearings, before the PSC which the PSC finds cannot be fully and fairly conducted without revealing confidential information. Such information must have been made confidential by PSC order in response to a

³⁶ Sections 364.183, 366.093, 367.156, and 368.108, F.S.

³⁷ *Id.*

³⁸ *Id.*

claim of proprietary confidential business information, pursuant to s. 364.183, F.S., or request for confidentiality pursuant to ss. 366.093, 367.156, or 368.108, F.S.

The bill requires a finding of confidentiality to be made no later than 20 days before the scheduled hearing. Additionally, the entire hearing, including confidential portions, must be recorded by a certified court reporter and the redacted transcript made subject to Florida's public records laws.

The bill provides a 21-day time frame, after the transcript is filed with the clerk, during which parties may make a claim that certain portions of the transcript should remain exempt, otherwise the claim is waived.

The bill requires the PSC clerk to prepare a transcript redacting information approved by the PSC for confidential treatment. The redacted transcript is subject to public records laws at the conclusion of the underlying proceeding.

The bill provides a mechanism for a court to review the transcript to determine if the redactions do not comply with applicable confidentiality orders. If a judicial determination is made, only the portion of the recording or transcript found to be non-exempt may be disclosed to the public.

The bill is subject to the Open Government Sunset Review Act, in accordance with s. 119.15, F.S., and will stand repealed on October 2, 2026, unless reenacted by the Legislature.

Section 2 amends s. 350.01, F.S., to provide that the PSC is not required to live-stream or make a recording available on its website for any portion of a hearing made exempt under its provisions.

Section 3 provides a statement of public necessity stating that:

- The PSC is charged by statute with establishing just, fair, and compensatory utility rates, and the fact-finding role of the PSC is integral in its decision making, as all PSC decisions must be supported by a record of competent, substantial evidence;
- Under certain circumstances, the PSC must be able to evaluate and discuss proprietary confidential business information in order to make a determination in the public interest, and parties must be able to conduct cross-examination on such information in formal evidentiary proceedings;
- The PSC and parties to PSC proceedings are constrained from asking questions about essential proprietary confidential business information important to the outcome of a case; and
- It is a public necessity that those portions of formal administrative hearings before the PSC at which proprietary confidential business information is discussed, and the associated portions of hearing transcripts, be made exempt from the Sunshine Law to allow parties to conduct cross-examination on such information and the PSC to evaluate the information and make a determination in the public interest.

Section 4 provides that the bill is effective upon becoming law.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

Article I, section 24(c) of the Florida Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public meeting or public record exemption. The bill creates a new public meeting and public record exemption; thus, it requires a two-thirds vote for final passage.

Article I, section 24(c) of the Florida Constitution, requires a newly created public meeting or public record exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public meeting exemption for only the portion of a formal administrative hearing held by the PSC that would reveal information specifically identified as confidential proprietary business information exempt from disclosure under existing public record exemptions in ss. 364.183, 366.093, 367.156, and 368.108, F.S. and creates a public record exemption for only those portions of the hearing transcripts found confidential pursuant to an order by the PSC.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 286.0113 and 350.01.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.